Filed 12/30/04 P. v. Esquibel CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. PETER ESQUIBEL, Defendant and Appellant.	B165767 (Los Angeles County Super. Ct. No. TA065805)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jack W. Morgan, Judge. Remanded for resentencing, otherwise affirmed.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the District Attorney of Los Angeles County, appellant was charged with five counts[1] of attempted, willful, deliberate, and premeditated murder, (Pen. Code[2] §§ 664, 187(a).) Count 1 further alleged that in the commission of the crime, appellant personally inflicted great bodily injury upon the victim, causing the victim to become comatose due to brain injury and to suffer paralysis (§12022.7(b).) The information additionally alleged as to all counts that a principal personally and intentionally discharged a firearm, thereby causing great bodily injury to the victims (§12022.53, subds. (d), (e)(1)); that a principal personally and intentionally discharged a firearm (§12022.53, subds. (c), (e)(1)); and that a principal personally used a firearm (§12022.53, subds. (b), (e).) The information also alleged that the offenses charged therein were committed for the benefit of, at the direction of and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§186.22, subd. (b)(1).)

Appellant was tried by a jury and found guilty of willful, deliberate and premeditated attempted murder on four counts (counts, 1, 2, 3, and 5) and guilty of the lesser included offense of assault with a firearm on one count (count 4; §245, subd. (a)(2).) The jury found to be true the allegations in count 1 that appellant personally inflicted great bodily injury upon the victim, thereby causing the victim to suffer paralysis, and that appellant personally and intentionally discharged a firearm, thereby proximately causing great bodily injury to the victim. The jury further found to be true, as to all five counts, the allegations that in the commission of the crimes, appellant acted for the benefit of, at the direction of, or in association with a criminal street gang with the intent to promote, further or assist in criminal conduct by gang members. With respect to

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[1] The victims were as follows: count 1, Taalefuli Ryan; count 2, Rayna Mulipola; count 3, Andrea Martin; count 4, Victor Martin; and, count 5, Jason Ryan.

[2] All further undesignated statutory references are to the Penal Code.

counts 2 through 4, the jury found that in the commission of the offenses, appellant personally and intentionally discharged a firearm and that appellant personally used a firearm.

Probation was denied and appellant was sentenced as follows: Count 1; life imprisonment, with a minimum term of 15 years on account of the gang crime allegation, plus 25 years to life for the use of firearm with great bodily injury enhancement, plus five years for the great bodily injury enhancement, for a total of 40 years to life plus five years; Count 2; life imprisonment for attempted murder, with a minimum term of 15 years to life on account of the gang allegation, plus 20 years to life for the use of firearm enhancement. This term for count 2 was ordered to run consecutive to count 1. On counts 3 and 5, the trial court imposed concurrent sentences identical to count 2. On count 4, the trial court imposed the upper term of 4 years for assault with a firearm.

Appellant filed a filed a timely notice of appeal on March 11, 2003.

CONTENTIONS ON APPEAL

The charges against appellant arose from an egregious set of facts; the entire restatement of which is not relevant to the outcome of the appeal. What is relevant is that the charges concerned a lone gunman coming into a public park area and shooting towards a group of adults and children playing in the park. A bullet grazed one of the children. Several adults chased after the shooter, who turned and shot again. One parent [victim in count 1] was shot and paralyzed. Evidence from the incident and expert testimony suggested that the shooting was done for the benefit of a criminal street gang.

The appeal in this case concerns the trial court's decision to exclude two friends of appellant from the courtroom during the examination of a seven year-old boy. A discussion regarding the presence of these spectators began prior to the opening statements in this case. On January 22, 2003, the prosecutor, outside of the presence of the jury, informed the trial court that because of the "gang implications" of this case, the mother of a seven-year-old witness was "concerned about retaliation in the neighborhood." The mother asked for several accommodations to limit the possibility

that her son would be identified. Specifically she asked if the boy could testify under the name of John Doe, instead of his own name. The mother was also concerned about having her son testify in the room while certain persons were in the audience inside the courtroom. The prosecutor explained to the trial judge: "And she's also concerned about having – when the child testifies having audience members in the court, as well. I assured – I don't see any people who appear to be friends of the defendant as far as young males here this morning. And I know his mother who, obviously, has a right to be here. [¶] There is one other person who is present, I think, associated with perhaps a mother or an aunt of some of his fellow gang members. And I'm concerned about her presence during the testimony of the child. And I ask that she be excluded as well as any young male Hispanics that might show up this morning, just for the children's testimony."

The defense counsel indicated that she would object to all of these requests and stated: "And as far as people in the audience coming in to testify [*sic*], I don't think there has been a showing that there has been any intimidation of any threats by anyone. This is an open proceeding."

Defense counsel explained that the men in question were friends of appellant's family. She stated "just because the witnesses feel that for some reason they may be in danger coming here, I don't think that is a justifiable reason. There is no actual showing of danger to exclude these people from the courtroom."

The trial court indicated that it thought the prosecutor was suggesting that the court exclude young Hispanic males during testimony of the child witness in question. The court added that it understood there was "implied intimidation" and that people living in a neighborhood "infested with these gang people" were concerned and frightened. However, the court acknowledged that it had not yet received any information that there was a danger to any witness at that point in time and it would have to see a danger to a witness. The trial court denied the prosecutor's request at this time.

Later, after her opening statements to the jury, the prosecutor engaged in the

following discussion with the court:

> "[Prosecutor]: I have the child's mother here. And I want a clarification first on the early ruling. I notice that there are two of the defendant's friends who have appeared since I made my motion this morning. And I would ask that during the child's testimony only that they be excluded for the reason, the reasons that I set forth. It is intimidation factor."
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> [¶]. . . [¶]
>
> "The Court: Does the child recognize either of those?"
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> "[Prosecutor]: Your Honor, the mother's concern is they will recognize the child when they see him in the neighborhood. And that puts the child's life in danger. It's not that the child recognizes them. It is that they will recognize the child."

The trial judge called counsel to side bar and, after some discussion, granted the "People's motion to the court to exclude public from courtroom during minor witness's testimony . . . ." The judge then stated:

> "Certainly the Court has to recognize when we have a witness that is a young witness that we have to make certain accommodations for such a witness. I think probably the appropriate thing, if these are friends of the defendant, why don't you just ask them to wait outside for the giving of this one testimony, and they can come back in thereafter. I don't see any harm will be done whatsoever. Certainly, a child is subject to intimidation, as are adults, but a child more so. And I think it would be the appropriate thing to do under these circumstances."

Defense counsel then spoke to the judge:

> "Your honor, then what I would ask this person, I have no interest – I could care less if they're here or not.[3] I did speak with my client. He does know them.

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[3] Respondent suggests that this statement of defense counsel reflects a waiver of the objection regarding an open and public trial. Given the context of the statement and the prior clearly stated objections of defense counsel, we find the suggestion of a possible

> I also spoke to his family friend and told them to make sure there is no contact whatsoever between any spectator and the witnesses, no riding the elevator, no looks, nothing that could be mistaken the wrong way."

Defense counsel went on to say that she would ask the two individuals to step out of the courtroom during the child witness's testimony, and she asked the trial court to take a break before the witness took the stand because she did not want the jury to see the two individuals coming in and out of the courtroom. Defense counsel then repeated:

> "I understand the district attorney's concern and I understand the position. But I just think this is an open proceeding. There has been absolutely no showing of any threats made. Like the court indicated, I mean, are these people that the child even recognizes? And if so, how is the witness being intimidated."

> "The Court: Well, again, we are dealing with a very youthful witness. And I'm sure it is a traumatic thing for a witness that age to come into court, anyway, is intimidating. Just in the interest of being sure that the child can relax as much as possible, it would be appropriate for these two gentlemen to leave just during this witness's testimony. Thereafter they can come back as long as they conduct themselves in the proper fashion."

Defense counsel also asked the court to take a five-minute break after the testimony of the child witness was completed, so that the two individuals who were going to be excluded during the witness' testimony could return to the courtroom. The trial court granted this request.

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express waiver to be both unsupported and an unreasonable interpretation of the facts.

CONTENTIONS ON APPEAL

Appellant's Contentions

Appellant's principal contention in this appeal is that the exclusion of two spectators who were friends of appellant violated his constitutional and statutory rights to a public trial. Appellant cites *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*), in support for his argument regarding constitutionality. In the *Cummings* appeal, a defendant convicted for murdering a peace officer claimed that the trial court erred when it failed to excuse a number of uniformed police officers in the courtroom as spectators. Rejecting the argument, the Supreme Court held: "In this case there was no effort to close the proceedings. Nonetheless, Cummings sought to exclude a segment of the public, the police officers had both common law and constitutionally based rights to attend the trial. Exclusion of any group on the basis of the member's status would be impermissible." (*Cummings*, *supra*, 4 Cal.4th at pp. 1298-1299.)

Appellant argues "the exclusion of Mr. Esquibel's friends was an especially egregious violation of Mr. Esquibel's right to a public trial, because preserving the ability of a defendant to have his friends and other supporters attend his trial is one of the core purposes of the public trial guarantee." Appellant then states that no reported case has decided whether the exclusion of a spectator in accordance with section 686.2 could violate a defendant's right to a public trial. Appellant also argues that the exclusion of appellant's friends fails to satisfy any of the requirements of section 686.2, which provides guidelines for the exclusion of spectators.

Respondent's Contentions

Respondent acknowledges both the United States Constitution and the California Constitution[4] provide that a person charged with a criminal offense is entitled to a public

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[4] The right to a speedy and public trial is only one of several rights contained in the Sixth Amendment to the United States Constitution. The Sixth Amendment also guarantees the right to a confrontation, the right to counsel, the right to present evidence on one's own behalf, and the right to confront one's adverse witnesses. (U.S. Const., 6th

trial and "[a] public trial ordinarily is one which is open to the general public at all times. (*People v. Woodward* (1992) 4 Cal.4th 376, 383; *People v. Byrnes* (1948) 84 Cal.App.2d 72, 73.)" Nevertheless, in defense of the action of the trial court, respondent argues that "[a] trial court has discretion to close a portion of a trial to the public even without the consent of or waiver by the defendant when there is good cause for such action based upon justice or protection of the parties. (*People v. Cash* (1959) 52 Cal.2d 841, 846.)" Alternatively, respondent argues that the trial court "properly excluded these two person [*sic*] in order to protect child witness from harassment and possible physical harm" and that the error, if any, was clearly harmless beyond a reasonable doubt.

DISCUSSION

Right to a Public Trial

The United States and the California State constitutions guarantee the right to a public trial. (U.S. Const., 6th Amend. & Cal. Const., art. I, § 15.)[5] The right to a public trial precludes the closure of substantive courtroom proceedings in criminal cases. "'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. . . . ." (*In re Oliver* (1948) 333 U.S. 257, 270, fn. 25 (*Oliver*).) "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." (*Waller v. Georgia* (1984) 467 U.S. 39; 46 (*Waller*); see also *People v.*

Amend.)

[5] The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." Article I, section 15 of the California Constitution provides, in pertinent part, that "[t]he defendant in a criminal cause has the right to a speedy public trial . . . ."

Woodward (1992) 4 Cal.4th 376, 385 (*Woodward*), cert. den. *sub nom. Woodward v. California* (1993) 507 U.S. 1053 [Federal and state constitutional rights to public trial are coextensive].) Due to its constitutional significance, when a violation of the right to a public trial has occurred, there is no requirement to prove any specific prejudice to the appellant. (See, *Waller, supra,* 467 U.S. at p. 45; *Arizona v. Fulminante* (1991) 499 U.S. 279; *People v. Byrnes* (1948) 84 Cal.App.2d 72.)

Importantly however the United States Supreme Court "has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Such circumstances will be rare, however, and the balance of interests must be struck with special care." (*Waller, supra,* 467 U.S. 39 at p. 45.) Consequently both the defendant's and the public's right may be subjected to reasonable restrictions that are necessary or convenient to the orderly procedure of trial and the trial court retains broad discretion to control courtroom proceedings in a manner directed toward promoting the safety of witnesses. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121.)

The leading California case on the exclusion of spectators from a trial is *Woodward, supra,* 4 Cal.4th 376. In *Woodward*, during the closing arguments, at the request of the trial judge the bailiff posted a sign on the courtroom doors announcing "trial in progress -- please do not enter." Courtroom spectators who were already present were not required to leave and additional spectators were permitted to enter at designated recesses. Neither defense counsel or the defendant were asked to agree with this procedure. Considering the propriety of this procedure, the Supreme Court held:

"[T]he right to public trial encompasses the closing argument phase of the trial. But we also conclude that the closure of the courtroom doors to additional spectators during part of the prosecutor's arguments, being both temporary in duration and motivated by legitimate concerns to maintain security and prevent continuous interruptions of closing arguments, and not involving the exclusion of preexisting

spectators, did not constitute a denial of defendant's public trial right." (*Woodward, supra,* 4 Cal.4th at p. 381.)

The *Woodward* court then cited several federal cases that held that the temporary exclusion of the public did not seriously deprive a defendant of his public trial right.[6]

In general, there are two types of exclusions: a total closure where all spectators are asked to leave the courtroom and a partial closure where some, but not all, spectators are asked to leave.[7] The total closure of the courtroom is almost always a per se violation of the constitutional rights of the accused. In the case of a partial closure, the Sixth Amendment public trial guarantee creates a "presumption of openness" that can be rebutted only by a showing that exclusion of the public was necessary to protect some "higher value" such as the defendant's right to a fair trial, or the government's interest in

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[6] "In *Snyder v. Coiner* (4th Cir. 1975) 510 F.2d 224, 230, a bailiff temporarily refused to allow persons to enter or exit the courtroom during closing arguments, in order to minimize distractions or disturbances. The federal court, rejecting the defendant's public trial claim, observed that the closure of the courtroom lasted only 'a short time,' did not restrict the defendant, his family, witnesses, or even the previously admitted courtroom spectators, and 'was entirely too trivial to amount to a constitutional deprivation.' (*Ibid.*; see also *U.S. v. Sherlock* (9th Cir. 1989) 865 F.2d 1069, 1076-1077 [applying less exacting 'substantial reason' standard for determining propriety of partial exclusion of public from courtroom]; *Davis v. Reynolds* (10th Cir. 1989) 890 F.2d 1105, 1109-1110, and cases cited [same] *Douglas v. Wainwright* (11th Cir. 1984) 739 F.2d 531 [same]; *United States* ex rel. *Lloyd v. Vincent* (2d Cir. 1975) 520 F.2d 1272, 1274-1275 [temporary exclusion of public did not 'seriously deprive' defendant of his public trial right]; *State v. Shaw* (Tenn.Crim.App. Tenn. 1981) 619 S.W.2d 546, 548 [temporary closure of courtroom doors *during closing arguments* to avoid interruptions held not violative of public trial guarantee].)" (*Woodward, supra,* 4 Cal.4th at p. 384.)

[7] Numerous cases and articles have discussed the topic of partial closure of a public trial. See 23 So. Cal. L.Rev. 91; 54 A.L.R.4th 1156 [exclusion of public from state criminal trial, for purpose of preserving confidentiality of undercover witness, as violating defendant's right to public trial]; 55 A.L.R.4th 1170 [exclusion of public from state criminal trial, for purpose of preventing disturbance, as violating defendant's right to public trial]; [exclusion of public from state criminal trial, to avoid intimidation of witness, as violating defendant's right to public trial].

preserving the confidentiality of the proceedings. (See *Waller, supra,* 467 U.S. 39 at pp. 44-45.) When such a "higher value" is advanced, the trial court must balance the competing interests and allow a form of exclusion no broader than needed to protect those interests. (*Ibid.*) Specific written findings are required to enable a reviewing court to determine the propriety of the exclusion. (*Id.* at p. 45)

The identity of the spectator sought to be excluded is also highly relevant. The United States Supreme Court made the following important observation in the *Oliver* case: [Absent certain special circumstances] "[N]o court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches. *And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.*" (*In re Oliver, supra,* 333 U.S. at pp. 271-272, italics added; see also *State v. Ortiz* (1999) 981 P.2d 1127 [complete exclusion of appellant's family members].)

In California, the requirements for excluding certain spectators from a public criminal trial are codified in section 686.2. Section 686.2 provides that a court may order the removal of any spectator who is intimidating a witness, but only after holding a hearing and making the following findings by clear and convincing evidence:

> "(1) The spectator to be removed is actually engaging in intimidation of the witness.
>
> "(2) The witness will not be able to give full, free, and complete testimony unless the spectator is removed.
>
> "(3) Removal of the spectator is the only reasonable means of ensuring that the witness may give full, free, and complete testimony."

Therefore, in cases such as ours involving only a temporary exclusion of a portion of the public, in the absence of a spectator who is engaged in the active intimidation of a witness, a court must determine whether there is otherwise a "substantial" reason for the exclusion, ensure the exclusion is no broader than necessary, and consider less restrictive alternatives.

The application of the above principles and the issue of whether an accused has

been denied his constitutional right to a public trial cannot be determined in the abstract, but must be determined by reference to the facts of the particular case. (*People v. Cash* (1959) 52 Cal.2d 841, 847.) As previously set forth, the appeal in this case involves a partial closure of the courtroom by the removal of two spectators during the examination of a young witness. The spectators, who were supporters of appellant, were removed at the request of the prosecutor based on the urgings and concern of the mother of the witness. Her principle concern in this gang related case was that the spectators may be gang members and would recognize her child, not that her child may recognize them. There was no evidence of intimidation or harassment. Over the objection of appellant, the trial court excluded these spectators during the child's examination. There was no compliance with Penal Code section 686.2, nor did the procedure attempt to meet the test suggested by *Sherlock.*

Nevertheless, based on both California and Federal authority we conclude that this exclusion was not a violation of appellant's constitutional right to an open trial. Here there was neither a complete nor an egregious violation of that right. There was no order excluding the press or the public in general. According to the record, except for these two spectators, everyone else connected with appellant was allowed to remain in the courtroom. The record reflects that appellant's mother remained in the courtroom and the exclusion of the spectators was only for the testimony of the single witness. It is also critical to our conclusion that the record shows after these spectators were removed, members of appellant's family remained in the courtroom. We conclude the partial closure of a trial resulting from the temporary exclusion of select appellant's supporters is not necessarily a violation of the right to a public trial. It is however, a risky procedure and should never be undertaken without resort to and compliance with a full evaluation of the necessity for the exclusion and the alternatives that might be taken. Here, the exclusion of the spectators was for a minimal amount of time and appellant's family supporters remained in the courtroom. While not in compliance with certain procedures, no constitutional error resulted.

SENTENCING ERRORS

Imposition of the Upper Term

In a supplemental opening brief, appellant contends the upper terms on count 4 must be vacated and the middle term imposed, because the aggravating factors used to justify the upper term in each instance were not found true beyond a reasonable doubt by the jury as required under *Apprendi v. New Jersey* (2000) 530 U.S. 466, as construed in *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). Under California's determinate sentencing scheme, when a statute provides for three possible prison terms, the court shall impose the mid term unless there are circumstances in aggravation or mitigation. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court., rule 4.420 (a).) If the court finds, by a preponderance of the evidence, aggravating circumstances, then it may impose the upper term. (Cal. Rules of Court, rule 4.420 (b).) *Blakely*, however, made clear that the "statutory maximum" is the sentence a judge may impose based on facts found by the jury or admitted by defendant. Therefore, if a court imposes the upper term based on facts not found by the jury or admitted by defendant, a *Blakely* violation may have occurred.

Under *Blakely*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 124 S.Ct. at p. 2537.) In California, that statutory maximum is the mid term. Here the trial court imposed the upper term on count 4 citing the cruelty of the crime and the vulnerability of the victims. These factors are still required to be presented to a jury or admitted by the defendant. Thus there was *Blakely* error and the case must be remanded for resentencing.

Waiver or Forfeiture of Blakely Error

The Attorney General contends appellant waived any claim of *Blakely* error by failing to request a jury trial of the aggravating factors in the trial court. We disagree. Under California law, a defendant's failure to object in the trial court, even to errors of

constitutional dimension, may lead to forfeiture of his claim of error on appeal. (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 634-637 [selection of unbiased jury]; *People v. Barnum* (2003) 29 Cal.4th 1210, 1224-1225, fn 2 [Fifth Amendment privilege against self- incrimination]; *People v. Saunders* (1993) 5 Cal.4th 580, 590 [right to jury trial of truth of alleged prior convictions].)

Although we understand the well established notion of waiver of a claim of error, we find there is no waiver or forfeiture of *Blakely* error in this case because a criminal defendant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial.

Sentence Enhancements

With regard to count 1, the trial court imposed both a 25 years-to-life enhancement, based on the jury's finding that appellant personally discharged a firearm and five-year enhancement based on the jury's findings that Mr. Esquibel personally inflicted great bodily injury on Ryan and caused him to suffer paralysis. Respondent concedes the sentencing error and upon resentencing the trial court is directed to delete the section 12022.7 enhancement to Mr. Esquibel's sentence in the new abstract of judgment.

DISPOSITION

The case is remanded to the trial court for resentencing in light of the *Blakely* error. The trial court is ordered to delete the section 12022.7 enhancement of appellant's sentence. In all other respects, the judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J. FLIER, J.